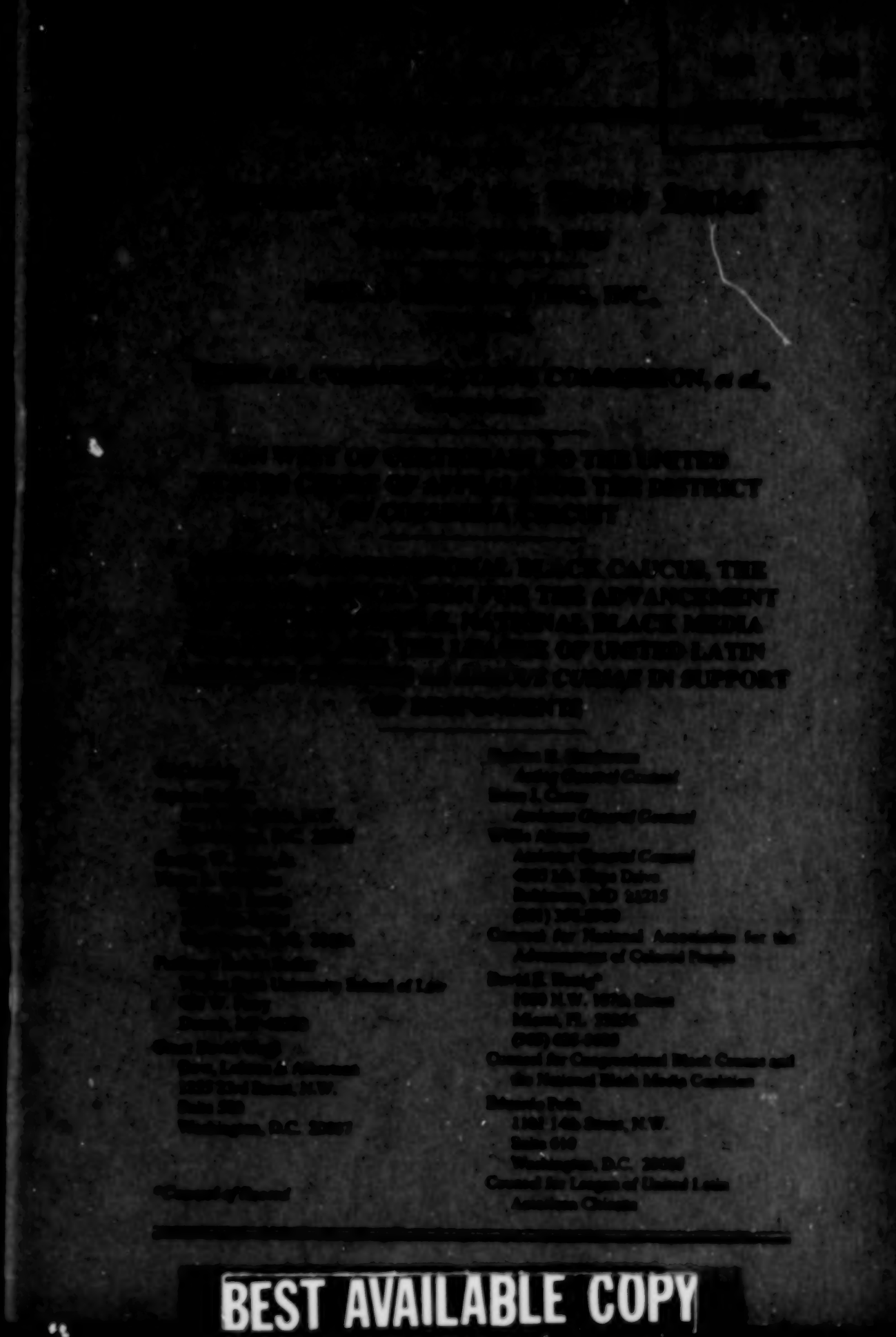

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No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTIONS PRESENTED

Whether Congress may require the Federal Communications Commission to consider the race of an applicant for a radio or television license to foster diversity among broadcast licensees and to avoid perpetuating the effects of prior state-sanctioned discrimination.

INTEREST OF AMICI CURIAE

The Congressional Black Caucus ("CBC") was formed in 1970 when thirteen Black members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of Black and minority citizens. The vision and goals of the original thirteen members, "to

promote the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the Caucus. The CBC is involved in legislative initiatives ranging from full employment, welfare reform, South African apartheid and international human rights, to minority business development and expanded educational opportunity.

The National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. It is a non-profit corporation with over 500,000 members and 2,300 branches and youth units throughout the country. The basic aims of the organization are to advance minority participation in all aspects of society and to destroy all limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing on minority employment and ownership in the broadcast media. Since its founding in 1973, NBMC has participated in dozens of adjudicatory and rulemaking proceedings to vindicate and expand the FCC's minority ownership policies.

The League of United Latin American Citizens ("LULAC") is a sixty-year old national membership organization concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively promoted minority employment and minority ownership policies in the broadcast media before the FCC and the courts.

The District of Columbia Circuit affirmed the comparative hearing policy prescribed by Congress and implemented by the Federal Communications Commission ("FCC"). The policy in

question is designed not only to remedy minority underrepresentation in broadcasting, stemming from past discrimination, but also to promote diversity of broadcast programming. Each of the *amici* is vitally interested in the policies implicated by the D.C. Circuit's decision in this case.

SUMMARY OF ARGUMENT

Congress has prescribed the continuation of the comparative hearing policy in order to promote diversity of programming, an interest rooted in the First Amendment, and to avoid the perpetuation of the effects of prior state-sanctioned discrimination, in accordance with its broad powers to enforce the Fourteenth Amendment. Unlike any other legislative body, Congress has the authority to act on the basis of findings to remedy past societal discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Accordingly, in determining the constitutionality of the distress sale, Congress's choices as to both means and ends are entitled to deference.

This Court has determined that race-based policies must survive strict scrutiny in order to be constitutional. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989). In particular, the policy must further a compelling governmental interest and must be narrowly tailored to achieve that goal. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). Because the comparative hearing policy fulfills those requirements, it is constitutional.

The comparative hearing policy serves the compelling governmental interest in promoting diversity among broadcast licensees, which is derived from First Amendment values. Congress and the Federal Communications Commission ("FCC") have determined that the public is best served by the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326

U.S. 1, 20 (1945). The FCC, empowered by the Communications Act of 1934 to promote the public interest, has decided that diversity of ownership is one means by which the listening and viewing public will be assured of receiving a broad spectrum of ideas. As a result, the FCC's policy to encourage diversity is an integral part of the agency's regulatory framework. The comparative hearing policy is just one component of the FCC's overall objective to diversify broadcast licensees.

The comparative hearing policy also serves the compelling state interest of remedying the effects of prior state-sanctioned discrimination. Congress and the FCC have found that the paucity of minority broadcast licensees today is attributable, at least in part, to past discrimination. H.R. Conf. Rep. 765, 97th Cong. 2d Sess. 43 (1982). Without affirmative action specifically directed toward increasing the number of minority licensees, the effects of their exclusion will continue indefinitely, since most licenses are renewed. The comparative hearing policy recognizes these facts and serves to hasten the dismantling of the virtual monopoly of radio and television licenses enjoyed today by nonminorities — a monopoly attributable in significant part to state-sanctioned discrimination.

The comparative hearing policy is narrowly tailored to achieve its objectives. The burden on nonminority broadcasters is minimal. Even after seventeen years of operation of this policy, approximately ninety-eight percent of all radio and television licenses are still held by nonminorities. Moreover, the policy is invoked only if no applicant has a clear advantage on the basis of race neutral criteria established by the FCC.

Because the policy is narrowly tailored to foster diversification and to remedy the effects of past discrimination, the use of the minority enhancement credits does not stigmatize minority broadcast licensees. The policy is based upon the premise that minority broadcasters can compete on equal footing with their white counterparts. It does not constitute a rigid quota

that bears no relationship to its ends. Nor does the policy brand its beneficiaries as unqualified, for only qualified applicants are entitled to be beneficiaries of the policy. Instead, the policy is used to promote diversity and equal opportunity where there is no quantifiable difference among all qualified broadcast applicants.

ARGUMENT

I. CONGRESS MAY PRESCRIBE THE CONSIDERATION OF RACE TO PROMOTE DIVERSITY AMONG BROADCAST LICENSEES AND TO AVOID THE PERPETUATION OF THE EFFECTS OF PRIOR DISCRIMINATION.

A. Congress prescribed the continuation of the comparative hearing policy initiated by the FCC in 1978.

Since 1987, Congress has required the FCC to maintain a race conscious comparative hearing policy.[1] This annual directive, appearing in the form of appropriations legislation, approved by the House and the Senate and signed by the President, prohibited the use of any federal monies for the purpose of repealing the policies to promote minority ownership in broadcasting. Any suggestion by the Petitioner, the United States, or other *amici* that such legislation is something less than an Act of Congress is untenable. Moreover, legislative materials preceding the 1987 appropriations bills indicate that Congress intended to preclude any action by the FCC to dismantle the

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[1] *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-10162, 103 Stat. 1020-1021 (1990).

race-conscious comparative hearing policy. *See e.g. Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 2d Sess., 13, 19, 21 (1986) ("*Hearings on H.R. 5373*") (Congressman Leland promised to introduce legislation "codifying existing FCC [diversity policies] . . . because of my fear of an FCC preemptive strike . . . during the Congressional recess."); *see also Minority Ownership of Broadcast Stations: Hearing before the Subcomm. on Communications of the Senate Committee on Commerce, Science, and Transportation*, 100th Cong. 1st Sess. 2 ("Congressional response [to the FCC's threatened dismantling of the diversity policies] was immediate, clear and virtually unanimous. Legislation was enacted instructing the FCC not to take any action to eliminate or undermine the minority ownership policies.")[2] The minority enhancement credit policy is thus "a deliberately chosen congressional policy." *Cf. Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 910 (D.C. Cir. 1989). Accordingly, the judgment of the court of appeals may be reversed only if *Congress* lacks power to prescribe the consideration of race[3] in comparative hearings to promote diversity among broadcast licensees and to

[2] Furthermore, it is axiomatic that the FCC, as a creation of Congress is bound to implement the legislative policies of that body. *See e.g. Humphrey's Executor v. United States*, 295 U.S. 605, 628 (1935) (Administrative agency, as creation of Congress, acts as "legislative aid", performing duties specified by the Congress); H. Rep. No. 363, 100th Cong. 1st Sess. 14 (1987) ("Congress created the FCC, the FCC carries out Congress' policies under Congress' standards; Congress oversees the FCC and agencies like the FCC serve . . . as a 'legislative aid'.").

Finally, the court of appeals decisions that may have served to focus the attention of the FCC on the need for action are immaterial to the constitutional validity of the Congressionally prescribed race conscious comparative hearing process. *See e.g. TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

[3] As the United States has noted, the policy granting enhancement credits on the basis of gender is not before this Court. Brief for United States at 5 n. 5, *Metro Broadcasting, Inc. v. FCC*, No. 89-453 (filed Feb. 9, 1990) ("U.S. Br.").

avoid perpetuating the effects of prior state sanctioned discrimination.

B. Congress is empowered by the Constitution to take actions to encourage full minority participation in the mainstream of American economic and political life is a reality, as long as those actions are clearly related to the stated ends.

Given the history of state-sanctioned racial discrimination in this country, strict scrutiny is the appropriate standard of review for race conscious governmental action. *E.g., City of Richmond v. Croson*, 109 S. Ct. 706 (1989). That same history, however, demands that this Court leave sufficient room for legislative action to eliminate the consequences of the nation's long failure to recognize that discrimination on the basis of race is immoral, illegal, and unconstitutional.

Congress, unlike any other legislative body, has the authority and the Constitutional mandate to enforce the promise of racial equality embodied in the Fourteenth Amendment in order to eradicate the effects of societal discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Burger, C.J.). Section Five of the Fourteenth Amendment specifically authorizes the political branches of the Federal Government to act to assure that all members of our society participate fully in the political and economic institutions of our nation. *See Id.* Because Congress has broad authority to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, it is thus entitled to deference with respect to both means and ends.[4]

[4] The United States concedes that Congress' judgment "that there is a need for remedial race-conscious action is entitled to significant deference." U.S. Br. at 17.

In addition, strict scrutiny does not authorize this Court to substitute its judgment for that of Congress as to either ends or means. *See Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *Fullilove*, 448 U.S. at 472. Congress, and not this Court, is charged with the responsibility of assuring that the guarantee of the Fourteenth Amendment becomes a reality for those who have been excluded from its protection for most of our history. *See Fullilove*, 448 U.S. at 472, 483-4 (Powell, J.). Accordingly, so long as the basis for Congressional action is discernible, Congress need not compile a record appropriate for judicial or administrative proceedings.[5] *Id.* at 463-7 (Burger, C.J.); *Id.* 448 U.S. at 503 (Powell, J.). Congress's judgment as to the need to take action to encourage full minority participation should therefore be sustained unless it is pretextual.

C. The comparative hearing policies further the compelling government objective of diversity among broadcast licensees.

This Court has recognized the First Amendment values served by the FCC's general policies to encourage diversity among broadcast licensees. *E.g., FCC v. National Citizens Committee*, 436 U.S. 775, 795 (1978). Throughout the history of broadcast regulation, the scarcity of frequencies for which applicants compete has compelled the FCC to make certain that licenses are distributed in a manner which, *inter alia*, ensures that the public has access to a variety of programming, and in so

[5] It should be noted, however, that Congress, through several hearings, has compiled an extensive record regarding the causes and effects of the underrepresentation of minorities in media ownership. *See e.g. Hearings on H.R. 5373*, 99th Cong. 2d Sess. (1986); *Minority participation in the Media: Hearings before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong. 1st Sess. (1983); *Parity for Minorities in the Media: Hearing before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong. 1st Sess. (1983).

doing, fulfills the mandate set forth in the Communications Act of 1934. As the Commission noted upon enacting the comparative hearing policy: "Diversification of control is a public good in a free society and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Policy Statement on Comparative Hearings*, 1 F.C.C.2d 393, 394 (1965).

Thus, in the context of regulation of the broadcast industry, diversity itself is the good. *Cf. Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.). Where the Federal Government maintains strict control over access to a scarce resource such as the broadcast spectrum, it may conclude that the public interest requires that no single person, entity, or group should be granted a monopoly of that resource — intentionally, inadvertently, or due to factors beyond its control. In particular, if its own actions or failure to act may have resulted in excluding identifiable groups, the Federal Government may conclude that the public interest requires affirmative efforts to increase the presence of those previously excluded.

The comparative hearing policy thus rests firmly on the presumption that the public interest is best served by the widest possible diversity among decision-makers. S. Rep. 192, 100th Cong., 1st Sess. 76 (1989); H.R. Conf. Rep. 765, 97th Cong., 2d Sess. 40 (1982); *Shurberg*, 876 F.2d at 942 (Wald, C.J., dissenting). The comparative hearing policy is just one aspect of the FCC's general diversity policies, and is integrally related to the FCC's broader regulatory policies, including, for example, deregulation.[6] Contrary to the arguments of Metro Broadcasting

[6] Several FCC rules regarding ownership of stations were enacted for purposes of providing the public with diverse programming. *See e.g.*, Chain Broadcasting Rules, 3 Fed. Reg. 747 (1938), in which the Commission set forth the areas of concern regarding network ownership of radio stations. Even at that time, the FCC had concluded that ownership had an effect upon the programming received by viewers. The result of that assumption was a rule

continued

and the United States, the validity of the FCC program does not depend at all on statistical proof that the programming decisions

limiting network ownership of radio stations. *See also* 47 C.F.R. § 73.3555, the FCC's multiple ownership rule, which prohibits licensees from owning two radio or television stations whose service areas overlap; and 47 C.F.R. § 73.658(f), prohibiting network ownership of television stations in areas "where the existing television broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing."

These rules were enacted to increase competition among licensees by prohibiting a monopoly of ownership by any one group, and to thereby increase the variety of programs available to the public. *See Hudson Valley Broadcasting*, 13 Rad. Reg. (P&F) 49, 58-59 (1956) ("The plain intent of . . . Rule [73.658(f)] is to prevent ownership or substantial measure of control . . . as to restrain, through limitation of competition, the receipt by the public of a variety of . . . programs.") The nexus between diversity of ownership and diversity of programming has thus been an underlying assumption of the FCC diversity policy since its inception.

of black or other minority licensees will be affected by their personal tastes, rather than the market.[7]

Nonetheless, by definition, diversity assures that programming decisions will not be made by a single person, entity, or group. Similarly, of course, the views of blacks and other minorities in America may be identical to those of white males on many issues of public policy. Diversity assures,

[7] Several studies do suggest, however, that the race of a broadcast licensee does have an effect upon programming. *See, e.g.*, The Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988). Data collected by the FCC from nearly 9,000 of its 12,101 television and radio stations, indicated that there is a strong correlation between minority ownership and programming targeted to minority audiences. While only 20% of stations without any Black ownership responded that they provide programming directed to Black audiences; 65% of stations with Black ownership said that they did so. Only 10% of stations without Hispanic ownership responded that they provided Hispanic programming, while 59% of stations with Hispanic owners did so.

This study was consistent with the results of four other studies addressing the same question. Johnson, Media Images of Boston's Black Community, (Jan. 28, 1987) (available at the William Monroe Trotter Institute, University of Massachusetts at Boston) (unpublished manuscript), (examining treatment of over 3000 local news stories by white and Black-owned media and finding statistically significant differences in racial identifications and positive or negative treatment of certain types of stories); Fife, The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study, (1986) (available at the Department of Telecommunication, Michigan State University) (unpublished study) (concluding that minority owned television stations had statistically significantly higher representation of Blacks on newscasts than did comparable nonminority owned stations); Jeter, "A Comparative Analysis of the Programming Practices of Black-Owned, Black-Oriented Radio Stations and White-Owned, Black-Oriented Radio Stations," Ph.D. Dissertation, University of Wisconsin, (1981) (finding that Black-owned radio stations had statistically significantly more diverse playlists, featuring jazz, rock, blues, gospel formats, e.g., than did white-owned, Black-oriented stations); Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," *printed in Proceedings of the Tenth Annual Telecommunications Policy Research Conference* 85, 87-88 (1983) (finding, for example, that in Black oriented stations, 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black).

Of course, it would be stereotyping to suggest that all minorities *should* only target their programming towards their respective groups, or that all minorities would even desire to do so. However, the evidence clearly shows that minority broadcasters *do* make special efforts to serve those members of their own racial group.

however, that on those occasions when race does make a difference, the voices of minority Americans will be heard distinctly and not as edited or screened by white males, to the benefit of the entire nation. *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 982 (1978).

D. The comparative hearing policy also furthers the compelling government objective of avoiding the perpetuation of the effects of prior discrimination.

As the Petitioner concedes, "the Federal Government has a compelling interest in remedying past discrimination and its lingering effects." Brief for Petitioner at 36,[8] *Metro Broadcasting, Inc. v. FCC*, No. 89-453 (filed Feb. 9, 1990) ("Pet. Br."). The distribution of radio and television licenses today is the product of a system of state-sanctioned preferences favoring white males that has existed since the founding of this nation. Accordingly, Congress's actions to redress the effects of the long history of legalized discrimination and to avoid the perpetuation of the legacy of discrimination are completely justified.

"No one doubts that there has been serious racial discrimination in this country." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986). For the first 150 years of the nation's history, this Court explicitly condoned discrimination against black Americans. *Scott v. Sandford*, 60 U.S. (19 How.) 39 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896). As a result, for the first 27 years of federal broadcast licensing, which includes the first 20 years of the FCC's existence, the licensing process occurred within this context of state-sanctioned discrimination against black Americans. This Court's recognition in 1954 that

[8] Metro Broadcasting's reliance on the FCC's statements in the court of appeals that the comparative hearing policy was not intended to remedy prior discrimination by the FCC or others is misplaced. Today, the comparative hearing policies are specifically prescribed by federal legislation. It is the constitutionality of Congress, action that is at issue in this case.

discrimination against black Americans in public education was inconsistent with the promise of equal protection did not eliminate racial discrimination or racism, as the Court's subsequent decisions eloquently attest. *United States v. Paradise*, 480 U.S. 149 (1987); *Cooper v. Aaron*, 358 U.S. 1 (1958). This Court has further acknowledged that neither the Civil Rights Act of 1964 nor subsequent legislation has eliminated discrimination on the basis of race or racism. *See e.g. Fullilove*, 448 U.S. at 477.

Until 1978 the FCC procedures for awarding radio and television licenses ignored the "lingering effects" of state-sanctioned racial discrimination on the ability of black Americans to compete for radio and television station licenses. As a consequence, virtually all broadcast licenses were awarded to white males.[9] In fact, not a single radio or television broadcast license was awarded to any black American after a comparative hearing until 1975.[10] By 1978, when the FCC adopted the comparative hearing policy, most radio and television licenses had been awarded.[11] FCC inaction during much of its history makes it at least a "passive participant" in the virtual exclusion of minority broadcast licensees.[12]

[9] Testimony of John Payton before the U.S. Senate Committee on Commerce, Science, and Transportation, Communications Subcommittee 21 n. 36 (Sept. 15, 1989).

[10] Testimony of David Honig before the FCC *en banc* AM Improvement Hearing 15 (Nov. 16, 1989). In 1949, however, Jesse Blayton purchased an existing station. Brief for NABOB at 17, *Astroline Communications Co., L.P. v. Shurberg Broadcasting of Hartford*, No. 89-700 (filed Feb. 9, 1990), citing M. Muhammed, "Minority Participation in Broadcasting," *Dollars & Sense*, May/June 1979 at 18. The first permit to construct a new broadcast station was awarded in 1956. Honig Testimony; M. Muhammed, *supra*.

[11] Payton Senate Testimony at 21.

[12] In addition, the FCC's actions which gave a head start in spectrum acquisition to licensees who discriminated against Blacks materially contributed to the present day underrepresentation of minorities in broadcast station ownership. Brief for Congressional Black Caucus, *et al.* at 20-22 and nn. 27-32, *Astroline Communications Co., L.P. v. Shurberg Broadcasting of Hartford*, No. 89-700 (filed Feb. 9, 1990).

Congress and the Commission have found that the paucity of minority broadcast licensees today is attributable at least in part to past racial discrimination. *E.g.*, H.R. Conf. Rep. No. 765 at 43; *Statement of Policy on Minority Ownership*, 68 F.C.C.2d at 981. Without affirmative action specifically directed toward increasing the number of minority licensees, white males will continue to control virtually all radio and television stations in this country. Race neutral polices seeking diversification of the ownership of radio and television stations failed to increase the number of minority licensees. Furthermore, because most licenses are renewed, the initial awards affect the distribution of licenses long into the future. *See generally Central Fla. Enterprises v. FCC*, 683 F.2d 503, 506-10 (D.C. Cir. 1982).[13]

The comparative hearing policy recognizes these facts, and serves to hasten the dismantling of the virtual monopoly of radio and television licenses enjoyed today by white males — a monopoly that is attributable in significant part to state sanctioned discrimination. The comparative hearing policy also attempts to correct the FCC's failure to acknowledge the consequences of state sanctioned racial discrimination before 1978. The equal protection component of the Fifth Amendment does not require Congress to ignore this nation's long, sordid history of racial discrimination. To hold that Congress must disregard that history and, more important, its present consequences would pervert the concept of equal protection and serve only to perpetuate the preferred place of white males throughout this nation's economic and political institutions.

[13] The United States correctly notes that significant numbers of radio and television licenses are transferred each year, but only the most well-financed Americans can even consider entering the bidding in the major markets today, *see* Owen, Beebe, and Manning, *Television Economics* 114 (1974); there are very few blacks, Hispanics, or women in that group.

E.The comparative hearing policy is narrowly tailored to achieve its objectives.

The burden of the comparative hearing policy on nonminority broadcasters is minimal. No nonminority applicant is excluded from competition for any license. The policy is invoked only if no applicant has a clear advantage on the basis of the race neutral criteria established by the FCC.[14] In effect, the policy functions as follows: when there is no significant quantitative difference among the applicants in their media holdings and in the extent to which their owners will be integrated into station management, the FCC advances the public interest in diversity by awarding the license to those who are least represented among current licensees.[15] Accordingly, any of several factors considered by the FCC can be dispositive.[16]

[14] *See Alexander S. Klein, Jr.*, 86 F.C.C.2d 423, 428-429 (1981) (qualitative enhancements are important, but cannot overcome clear quantitative differences in integration proposals.)

[15] Metro Broadcasting emphasizes the potential importance of the applicant's race in modern comparative hearings, but omits any mention of the critical fact: seventeen years after this policy was adopted, approximately 98% of all radio and television licenses still are held by non-minorities.

[16] The fact that, as Metro contends, the policies have been effective in encouraging applicants who own no other licenses (and discouraging applicants who own other licenses) is not a criticism, but confirmation of the effectiveness of the policies.

Metro also complains that the comparative hearing policies may be circumvented by careful structuring of the application. If the FCC concludes that the ownership structure of any applicant is an attempt to circumvent the spirit of the comparative hearing policy, it may reject such applications. Presumably, the credit that Metro Broadcasting received as a consequence of its "19.8% principal who was black" was not the result of circumvention.

In any case, the FCC has not hesitated to exercise its broad powers to discourage sham applications. *See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 3 F.C.C.Rcd 5179 (1988).

Moreover, a broadcast applicant who obtains a license through the minority ownership policies is not insulated from FCC sanctions for violating

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The goal of diversity of broadcast licensees cannot be achieved with race-neutral policies. The FCC adopted the comparative hearing policy only after race neutral policies had proven ineffectual.[17] The need for race conscious programs arises in large part from the history of racial discrimination that produced a virtual white male monopoly of mass media licenses.

II. THE COMPARATIVE HEARING POLICY DOES NOT STIGMATIZE MINORITY BROADCAST LICENSEES.

Because the comparative hearing policy is narrowly tailored to advance diversification and to remedy the effects of past state-sanctioned discrimination, it does not stigmatize minority broadcast licensees. *See Fullilove*, 448 U.S. 521 (Marshall, J.). As set forth more fully above, the policy does not consist of a rigid quota or set-aside which is not rationally related to the goals of Congress or the FCC. The policy is grounded instead in the notion that some race-based measures are necessary to advance diversification and compensate for past state-sanctioned exclusion of minorities.

The awarding of minority enhancement credit does not assume any inability to compete in the future on the part of minority broadcasters. On the contrary, the policy is activated only if a minority applicant's qualifications are quantitatively similar to competing applicants. Thus, an applicant may be awarded a broadcast license on the basis of the comparative hearing policy only if it is "qualified to do the work" in the first

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the terms of the license. *See Silver Star Communications-Albany Inc.*, 3 F.C.C. Rcd. 6342 (Rev. Bd. 1988) (licenses revoked where minority distress sale purchaser failed to operate stations personally as required by the terms of his license).

[17] The distinction the United States offers between efforts to increase diversity of programming and efforts to increase diversity of ownership is a distinction without a difference, for the FCC has attempted to achieve diversity of programming principally through diversity of ownership

instance. *Id.* Because all applicants must meet the same basic qualifications in order to be considered for licensing, *Policy Statement on Comparative Hearings*, 1 F.C.C.2d at 394, the consideration of race in this context functions only as a "plus-factor," which is necessary to address the history of state sanctioned discrimination which has resulted in the virtual absence of minorities from the broadcast industry. Thus, the policy does not brand its beneficiaries as unqualified, since all broadcasters are held to the same stringent qualifying standard from the beginning.[18]

The comparative hearing policy is thus carefully designed to avoid stigmatizing minority licensees. In particular, the policy has a remedial purpose: to provide minority broadcasters with the access to the licensing process which was denied them through state-sanctioned discrimination. *Cf. Croson*, 109 S. Ct. at 2767. ("Unless [classifications based on race] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") Moreover, it has affected only a small number of nonminority broadcasters, such that only two percent of all broadcast licenses are held by minorities. *See Fullilove*, 448 U.S. at 521. The awarding of minority enhancement credits is thus a legitimate race-based policy confined to the specific purposes of remedying

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[18] Indeed, the FCC Review Board has refused to award a special credit to a minority applicant for proposing to broadcast minority-oriented programming, holding that this would be premised on an invidious racial stereotyping of the very character derived by the majority panel in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). *Suburbanaire, Inc.*, 104 F.C.C.2d 909 (Rev. Bd. 1986).

The Commission is sensitive to questions of stereotyping and stigma. It awards credit for minority ownership without regard to the market demographics to be served, correctly recognizing that minorities can succeed in diversifying information provided to nonminorities just as well as they can succeed in diversifying information provided to nonminorities. *See Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264-65 (1982), *aff'd sub nom., West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

past societal discrimination and furthering the First Amendment interest in promoting diversity in broadcasting.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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